Supreme Court, U.S.
FILED

No. 09-890

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IN THE

Supreme Court of the United States

WILLIAM HAVENS, PETITIONER

v.

UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI,

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QUESTIONS PRESENTED

I Whether the Court of Appeals Decision Affirming the Commencement of the Statute of Limitations in Military Pay Cases at Separation Instead of Discharge is in Conflict With Other Circuits.

II. Whether the Statute of Limitations Begins to Run at the Final Action of the Physical Evaluation Board or in the Alternative at the Acceptance of the Physical Evaluation Board by the Member

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OPINIONS BELOW

The Opinion of the Court of Appeals for the Federal Circuit denying the petition for rehearing/rehearing en banc is unreported. The Opinion of the Court of Appeals for the Federal Circuit affirming the Court of Federal Claims is unreported. The Opinion of the Court of Federal Claims is unreported.

JURISDICTION

These issues are properly before the Supreme Court of the United States pursuant to 28 U.S.C. § 1254 and Rule 10 of the Supreme Court rules. The final judgment of the United States Court of Appeals for the Federal Circuit denying the petition for rehearing/rehearing en banc was entered on October 15, 2009. The submission for filing is within the 90 day requirement of Rule 13.1 of the Supreme Court Rules. This proceeding does not question the constitutionality of any Act of Congress or any State Legislature. Consequently, the provisions of Rule 29.4(b) and (c) do not apply.

RELEVANT PROVISIONS INVOLVED

Pertinent text of citations are set out in the appendix.

STATEMENT

1. Plaintiff, Commander Bill Havens, filed the complaint in the trial court on November 7, 2007. This matter arose out of illnesses and injuries incurred while on

active duty. On 31 August 1996, after 16 years 5 months and 9 days of active service, Commander Havens was released from active duty via a separation. He was not "discharged" in 1996 but was transferred to the Selected Reserve. There was no break in service. He remained in the Selected Reserve until March of 2002.

2. In November 1999, Commander Havens filed an application with the Board for Correction of Naval Records (BCNR). It was denied on June 13, 2000. A request for reconsideration was filed in August of 2001 and was denied on October 29, 2001. Another application was filed in January 2002. It was denied in May of 2002.

3. On January 2, 2002, the Navy's Physical Evaluation Board found plaintiff not physically qualified for active duty in the Naval Reserve.

4. Plaintiff was not discharged until March 1, 2002, concurrent with his transfer to the Retired Reserve. A third BCNR petition was filed in May of 2005 and was denied on August 4, 2006. A request for reconsideration was denied on April 9, 2007.[1]

5. The complaint in this matter was dismissed on November 4, 2008.

6. Havens was commissioned an Ensign in the United States Naval Reserve on 22 March 1980

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[1]Commander Havens made all BCNR applications *pro se* without benefit of legal counsel.

7. Prior to his entry onto active duty, plaintiff did not suffer from any medical injury.

8. He was selected for the Training and Administration of Reserve (TAR) program in 1986. As a TAR, he maintained his Naval Reserve commission and was not augmented into the regular Navy. He was never a member of the regular component the United States Navy. Instead he was on the Reserve active status list required by 10 U.S.C. § 14002.

9. Plaintiff reported to Naval Reserve Readiness Center Treasure Island in June 1994 as a Lieutenant Commander (O-4). He began having a series of medical problems that led to his current claim. The problems were permanent and stable. In his separation physical the medical officer documented his medical condition.

10. During this time period, the Oaknoll Medical Center was undergoing closure as part of the Base Realignment and Closure Committee (BRAC) process. Doctors and other medical personnel were on leave and/or being transferred. Medical care and administration at Oaknoll during this period was sub-standard. Havens should have been evaluated by the disability evaluation system, but due to downsizing in support of base closures he was not.

11. At plaintiff's request, his command asked the Treasure Island Clinic to ascertain whether the physical disability process was applicable. As the Commanding Officer was on leave, action was delayed for one week. Plaintiff asked that a medical board, the first step in the physical disability process, be scheduled.

12. The Air Force medical staff at Travis was unsure how to process a Naval officer for the physical disability evaluation system and did not possess any of the pertinent Navy directives. No action was ever taken by Air Force or Navy medical personnel. The Medical Officer at Treasure Island Clinic indicated the Commanding Officer did not want to do a Medical Board because it could delay plaintiff's separation and because the facility was understaffed due to the closure.

13. Plaintiff was released from active duty on 31 August 1996, after 16 years 5 months and 9 days of active service. He was not discharged.[2] Instead he was released from active duty and accepted for affiliation in the Selected Reserve. He commenced drilling as a Selected Reservist in September 1996 at the Naval Reserve Center, Sacramento, California with no break in service.

14. In May of 2000 NARC plaintiff was transferred to a not physically qualified status, without evaluation by a medical officer. In January of 2001, the Bureau of Medicine and Surgery directed that plaintiff be placed in a "Category 5" not physically qualified status due to the existing psoriasis and psoriatic arthritis.

15. In January 2001, plaintiff verbally requested placement in the physical disability program and that he

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[2]In this case, plaintiff was transferred to the Selected Reserve portion of the Ready Reserve as defined in 10 U.S.C. § 10143 and 32 C.F.R. § 100.6(b). Transfer to the Ready Reserve instead of discharge was authorized pursuant to 10 U.S.C §§ 14506 and 14513. Notably on CDR Havens DD-214 there is a notation that he is still eligible for screening and recall to active duty.

be treated as an active duty member as required by directives. No line of duty investigation was completed as required by regulations.

16. In May of 2001, plaintiff was advised telephonically that he was eligible for a fitness for duty determination by the disability evaluation system.

17. In June 2001 plaintiff was found to be fit for duty by the Physical Evaluation Board. In July of 2001 the Physical Evaluation Board reversed itself and found plaintiff to be not fit for duty and not physically qualified to continue Reserve status. They further found that the disability was not a proximate result of performing military duties.

18. On January 2, 2002, the Physical Evaluation Board found plaintiff not physically qualified for active duty in the Naval Reserve.

19. On March 1, 2002, plaintiff was transferred to the Retired Reserve. At this point he was discharged from the naval service.

REASONS FOR GRANTING THE PETITION

I The Court of Appeals Decision Affirming the Commencement of the Statute of Limitations in Military Pay Cases at Separation Instead of Discharge is in Conflict With Other Circuits.

1. The decision below was controlled by the Federal Circuit's holding in *Martinez v. United States*, 333 F.3d 1295 (Fed. Cir. 2003). The Court of Claims and

apparently the Federal Circuit adopted the reasoning of *Martinez*. *Martinez* is in conflict with the other circuits. *Martinez* held that the application to a military correction board does not toll the statute of limitations. Specifically the *Martinez* court found the following:

> In a military discharge case, this court and the Court of Claims have long held that the plaintiff's cause of action for back pay accrues at the time of the plaintiff's discharge.

2. As noted in *Martinez*, other Circuits have come to opposite conclusions. *Geyen v. Marsh*, 775 F.2d 1303, 1308 (5th Cir.1985); *Walters v. Sec'y of Defense*, 725 F.2d 107, 114 (D.C.Cir.1983); *Nichols v. Hughes*, 721 F.2d 657, 659 (9th Cir.1983); *Ballenger v. Marsh*, 708 F.2d 349, 350 (8th Cir.1983). Thus *Martinez* is in conflict with the other circuits, within the scope of Rule 10(a) and this Court must resolve the conflict.

3. The *Martinez* court and the court below, improperly resolved an important point of law within the scope of Rule 10(c) that should, especially in light of the circuit conflict, be decided by this court. *Martinez* and the trial court below held that the discharge corresponded to the issuance of the DD-214 or separation for active duty. This is not the case and *Martinez* erred in this respect.

4. A discharge is defined by the Secretary of Defense in 32 C.F.R. § 724.107 as a complete separation from the naval service. The naval service is defined as active and inactive reserve components of the United States Navy and the United States Marine Corps. 32 C.F.R. § 724.101. Issuing a service member a DD-214 does not

result in a discharge. In *Lawrence v. Maksym*, 58 M.J. 808, 811 (Nav. Mar. Crt. Crm. Appl. 2003), (decided after *Martinez*), the Navy-Marine Corps Court of Criminal Appeals addressed the effect of a separation from active duty as opposed to a discharge. The *Lawrence* court found:

> The petitioner asserts that the DD 214 by its own wording is equivalent to a discharge certificate. However, we find that the petitioner was not discharged when he received the DD 214. He merely terminated a period of reserve active duty, but remained a member of the inactive reserves. The DD 214 reflects that the petitioner was a member of the USMCCR (KM)(Ready Reserve or Standby Reserve who may be recalled to active duty by the President).

Lawrence, 58 M.J. at 811. *See, also, Brannum v. Lake*, 167 Fed.Appx. 813 (D. C. Cir. 2005).

5. The *Lawrence* court went on to note that, as in the instant case, the military member was a member of the Ready Reserve and as such was eligible for recall to active duty. *Id.*

6. The DD-214 form can be used for both discharge or separation, although in case of a discharge another discharge certificate is provided. Discharged personnel have no further rights or responsibilities while personnel who are separated may be subject to recall to active duty. For example persons who enlist for four years incur an eight year service obligation. After the four year enlistment they are not discharged but separated

from active duty and must perform the remainder of their obligation in the reserve component. 10 U.S.C. § 651.

7. Since the plaintiff was a member of the Selected Reserve until 1 March 2002, he was not discharged until that date. Thus the cause of action did not accrue until that date. To the extent that *Martinez* is in conflict, *Martinez* was wrongfully decided.

II. The Statute of Limitations Begins to Run at the Final Action of the Physical Evaluation Board or in the Alternative at the Acceptance of the Physical Evaluation Board by the Member

1. The court below has determined that the statute of limitations begins to run at separation. Not only is this in conflict with the other circuits and the military courts, but it is an important issue that must be resolved by this Court. In the instant case, the actions taken that led to Havens' forced retirement from the Naval Reserve, did not take place until 2002. Havens was a member of the Selected Reserve and he was not discharged until March of 2002, well within the statute of limitations.

2. In the trial court, the defendant referred to the various appeals to the Board for Correction of Naval Records (BCNR). This is a red herring. It was not the action of the BCNR that triggered the cause of action, but the actions of the Physical Evaluation Board. A Tucker Act claim accrues "as soon as all events have occurred that are necessary to enable the plaintiff to bring suit, *i.e.*, when "all events have occurred to fix the Government's alleged liability, entitling the claimant to

demand payment and sue here for his money." *Martinez*, 333 F.3d at 1303. In this case, there was no way that the plaintiff could bring the action until the Physical Evaluation Board acted on January 2, 2002, which was less than six years before suit was filed. The BCNR did not have the authority to act as a Physical Evaluation Board. Until the Physical Evaluation Board acted, Havens could not assert the disability claim in the court below or any other court.

3. In *Chambers v. United States*, 417 F.3d 1218 (Fed. Cir 2005) the appeals court specifically found that the rule in *Martinez*, that a claim accrues at discharge, did not apply to disability retirement cases. *Id* at. 1223. Here the Physical Evaluation Board was the first appropriate board to consider the claim. Thus the cause of action did not accrue until January 2, 2002.

4. In the instant case, the Physical Evaluation Board is a statutorily required remedy as reflected in 10 U.S.C. §§ 1204, 1222 and 32 C.F.R. § 728.101. The Physical Evaluation Board is the retiring board. *Lawler v. U.S.*, 169 Ct.Cl. 644 (Ct.Cl.1965). No one can be denied benefits without a hearing before a full and fair hearing before a physical evaluation Board. 10 U.S.C. § 1214.

5. A Tucker Act claim does not accrue until "all events have occurred that are necessary to enable the plaintiff to bring suit, i.e., when "all events have occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue here for his money. " *Martinez*, 333 F.3d at 1303. The *Chambers* court went on to find that claims of entitlement to disability retirement pay generally do not accrue until the

appropriate military board either finally denies such a claim or refuses to hear it. *Id* at 1224.

6. At oral argument in the Court of Appeals, the government conceded that a cause of action would accrue once the military member accepted the decision of the Physical Evaluation Board. This occurred on November 8, 2001. The complaint was filed on November 7, 2007, within six years after the acceptance.

7. More importantly, the Physical Evaluation Board, the proper statutory board, did not deny benefits until January 2, 2002. Thus, under *Chambers*, the right to sue did not accrue until that time. *Chambers*, 417 F.3d at 1224. Since this cause of action articulated in paragraph 3 of the prayer for relief accrued in January of 2002, the complaint was timely filed.

CONCLUSION

For the reasons delineated herein, petition prays that a writ of certiorari be issued to the United States Court of Appeals for the Federal Circuit.

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2009-5039

WILLIAM HAVENS,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 07-CV-780,
Chief Judge Edward J. Damich.

O R D E R

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellant, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be,

and the same hereby is, DENIED.

The mandate of the court will issue on October 22, 2009.

FOR THE COURT,

Jan Horbaly
Clerk

Dated: 10/15/2009
cc: John B. Wells
Douglas G. Edelschick

HAVENS V US, 2009-5039
(CFC - 07-CV-780)

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2009-5039

WILLIAM HAVENS,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

John B. Wells, Law Office of John B. Wells, of Slidell, Louisiana, argued for plaintiff-appellant.

Douglas G. Edelschick, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief were Michael F. Hertz, Deputy Assistant Attorney General, Jeanne E. Davidson, Director, and Reginald T. Blades, Jr., Assistant Director. Of counsel on the brief was Marc S. Brewen, Lieutenant Commander, Office of the Judge Advocate General, United States Department of the Navy, of Washington, DC.

Appealed from: United States Court of Federal Claims

Judge Edward J. Damich

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2009-5039

WILLIAM HAVENS,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Judgment

ON APPEAL from the United States Court of Federal Claims

in CASE NO(S). 07-CV-780

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam (MICHEL, Chief Judge, LOURIE, Circuit Judge, and CLARK, District Judge*).

AFFIRMED. See Fed.Cir.R.36.

ENTERED BY ORDER OF THE COURT

DATED August 7, 2009 */s/ Jan Horbaly*
Jan Horbaly, Clerk

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* Honorable Ron Clark, District Judge, United States District Court for the Eastern District of Texas, sitting by designation.

In the United States Court of Federal Claims
No. 07-780 C
(Filed: November 4, 2008)

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WILLIAM HAVENS, *

*

Plaintiff, *

*

v. *

*

THE UNITED STATES, *

*

Defendant. *

*

****

OPINION

Plaintiff alleges that his 1996 release from active duty in the United States Naval Reserve was improper because of his medical condition. He claims that he should have been retained on active duty to receive medical treatment or should have been permitted to retire for medical reasons. He asks the Court to set aside the release from active duty, or alternatively, to grant him disability retirement benefits retroactive to 1996.

The case is now before the Court on Defendant's Rule 12(b)(1) Motion to Dismiss ("Defendant's Motion"). The Government argues that Plaintiff's Complaint fails to satisfy this Court's six-year statute of limitations. The Court agrees and grants Defendant's Motion.

I. Background

Plaintiff was first commissioned in the United States

Naval Reserve in 1980. Am. Compl. ¶ 3. In 1995, he was diagnosed with psoriasis and psoriatic arthritis. *Id.* ¶ 12. Plaintiff was not selected for promotion for Fiscal Year 1996. *Id.* ¶ 10. He asked the Naval Reserve to begin the process of evaluating him for a physical disability by convening a medical board, but no action was taken. *Id.* ¶¶ 19-21. In 1996, after not being selected for promotion a second time, Plaintiff was released from active duty, as required by 10 U.S.C. § 14506. Am. Compl. ¶¶ 22-23, 30. After he was released from active duty in 1996, Plaintiff continued serving in a different
component of the Naval Reserve until 2002, when he retired from the Naval Reserve. *Id.* ¶¶ 28, 30, 77.

Since 1996, Plaintiff has challenged his release from active duty on a number of occasions. On November 11, 1999, Plaintiff filed an application with the Board for Correction of Naval Records ("BCNR"), seeking to have his 1996 release for failure to be promoted reversed and a medical board convened to determine if he was eligible for disability retirement. BCNR Admin. R. 167. By letter dated June 13, 2000, the BCNR denied Plaintiff's application. *Id.* at 154. For several years, Plaintiff continued to challenge his 1996 release from active duty within the Navy until he eventually filed a Complaint at this Court on November 7, 2007.

II. Analysis

A. Standard of Review

In considering Defendant's Motion, the Court treats all of Plaintiff's well-pleaded allegations as true and draws all reasonable inferences in Plaintiff's favor. *See*

Perez v. United States, 156 F.3d 1366, 1370 (Fed. Cir. 1998). However, the burden of establishing jurisdiction rests with Plaintiff. *See Taylor v. United States*, 303 F.3d 1357, 1359 (Fed. Cir. 2002). And the six-year statute of limitations set forth in 28 U.S.C. § 2501 is a limitation on the Court's Tucker Act jurisdiction. *See John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 753-55 (2008). The Court must dismiss Plaintiff's claims if they first accrued more than six years before he filed his Complaint in this Court.

B. Wrongful Discharge Claim

Plaintiff alleges that the Naval Reserve wrongfully released him from active duty in 1996. Compl. at 15. He seeks restoration to active duty with pay and benefits retroactive to September 1, 1996. *Id*

"In a military discharge case, . . . the plaintiff's cause of action for back pay accrues at the time of the plaintiff's discharge." *Martinez v. United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003) (en banc). "If the plaintiff does not file suit within the six-year limitation period prescribed in 28 U.S.C. § 2501, the plaintiff loses all rights to sue for the loss of pay stemming from the challenged discharge." *Martinez*, 333 F.3d at 1304.

Plaintiff argues that his 1996 release from active duty was not a discharge. Plaintiff insists that he was not actually discharged until he retired in 2002, and therefore his claims are not time-barred. However, as Defendant points out, it was exactly this sort of situation that the Federal Circuit considered in *Martinez*. 333 F.3d at 1310 n.3. In *Martinez*, the plaintiff was separated from active duty in 1992. *Id*

From 1992 to 1997, Mr. Martinez continued to serve in the United States Army Reserve, but not on active duty. *Id.* Although the final 1997 separation from the Army Reserve was within six years of the date Mr. Martinez filed his complaint, the claim was still time-barred because it was clear to the Federal Circuit "that Mr. Martinez's cause of action did not accrue at the time he was discharged from the United States Army Reserve" in 1997. *Id.*

Regardless of any ambiguity as to when Plaintiff can properly be said to have been discharged from the Naval Reserve, the relevant date here is undoubtedly the 1996 release from active duty. As the Federal Circuit explained in *Martinez*, "[b]ecause Mr. Martinez was separated from active duty in 1992, his monetary and incidental equitable claims with respect to his active duty status accrued at that time, not in 1997." *Id.* Thus, in *Martinez*, the Federal Circuit, sitting en banc, expressly rejected the argument Plaintiff now advances. Plaintiff's claim for improper release from active duty accrued at the time of that release in 1996, and is now time-barred.

C. Disability Retirement Claim

Alternatively, Plaintiff argues that he should have been found unfit for active duty in1996 and granted disability retirement benefits. Am. Compl. ¶¶ 85-87. The Government argues that this claim also accrued when Plaintiff was released from active duty in 1996 or, at the latest, in June 2000. Plaintiff again argues unconvincingly that the claim accrued in 2002. Claims for disability retirement pay accrue when "the appropriate military board either finally denies such a

claim or refuses to hear it." *Chambers v. United States*, 417 F.3d 1218, 1224 (Fed. Cir. 2005). Thus, "if at the time of discharge, the service member requested review by an appropriate board and the request was denied, . . . then the limitations period begins to run upon discharge." *Id.* at 1225.

According to his own allegations, Plaintiff requested an evaluation by a medical board before discharge from active duty and that request was not granted, so the claim may well have accrued when he was released from active duty in 1996. In Plaintiff's Amended Complaint, he alleges that before his discharge he "asked that a medical board . . . be scheduled," which would have been "the first step in the physical disability process." Am. Compl. ¶ 19. But "[n]o action was ever taken by Air Force or Navy medical personnel." *Id.* ¶ 21. Allegedly, Plaintiff was informed that "the Commanding Officer did not want to do a medical [b]oard because it could delay plaintiff's discharge and because the facility was understaffed due to [its] impending
closure." *Id.* ¶ 26.

But even if the disability retirement claim did not accrue in 1996, it would still be timebarred because there can be no question that it had accrued by June 2000, when the BCNR issued a decision denying Plaintiff's application for relief. When a service member first brings a disability retirement claim before the BCNR, the plaintiff's cause of action accrues upon that board's final decision. *See Friedman v. United States*, 310 F.2d 381, 396 (Ct. Cl. 1962). Here, Plaintiff raised his disability retirement claim in his November 11, 1999 application to the BCNR, in which he requested that

his separation from active duty be reversed due to a finding of disability. BCNR Admin. R. 154, 167. The BCNR denied Plaintiff's application on June 13, 2000, and the statute of limitations began to run, if it had not already.

Plaintiff argues that the statute of limitations did not begin to run in June 2000 because the BCNR was not the appropriate board. Rather, Plaintiff believes that another board's 2002 decision started the clock. In January 2002, shortly before Plaintiff retired but well after the 2000 BCNR decision, a Physical Evaluation Board found him "not physically qualified for active duty in the Naval Reserve." Am. Compl. ¶ 76. According to Plaintiff, "[i]t was not the action of the BCNR that triggered the cause of action, but the actions of the Physical Evaluation Board." Pl.'s Opp'n to Def.'s Mot. ("Pl.'s Opp'n") 6. "Until the Physical Evaluation Board acted, plaintiff could not assert the disability claim in this or any other court," Plaintiff argues, because "the Physical Evaluation Board was the first appropriate board to consider the claim." *Id.* at 6-7. In support of this proposition, Plaintiff asserts that Defendant misapplies *Chambers*. Pl.'s Opp'n 7.

In fact, it is Plaintiff, not Defendant, who misconstrues *Chambers*. *Chambers*, in its repeated references to "the Correction Board," makes clear that the BCNR, or Board for Correction of Naval Records, is an appropriate board. 417 F.3d at 1225 (citing *Friedman*, 310 F.2d at 396). Moreover, *Chambers* expressly states that *Friedman's* "first competent board rule" stands. *Id.* Often, the BCNR is not the first board to hear a service member's claim. However, when the BCNR is the first board to hear the claim, it

still qualifies as the competent, appropriate board, and the "cause of action accrues upon the Correction Board's final decision." *Friedman*, 310 F.2d at 396. Plaintiff's disability retirement claim accrued no later than June 13, 2000. His 2007 Complaint fails to satisfy the statute of limitations.

III. Conclusion

Defendant's Motion is GRANTED. The Clerk of the Court is directed to dismiss Plaintiff's Amended Complaint.

s/ Edward J. Damich
EDWARD J. DAMICH
Chief Judge

In the United States Court of Federal Claims
No. 07-780 C

WILLIAM HAVENS

JUDGMENT

v.

THE UNITED STATES

Pursuant to the court's Opinion, filed November 4, 2008, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the amended complaint is dismissed.

John S. Buckley
Acting Clerk of Court

November 4, 2008

By: s/ Debra L. Samler
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $455.00.

TEXT OF PERTINENT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

10 U.S.C. § 651

(a) Each person who becomes a member of an armed force, other than a person deferred under the next to the last sentence of section 6(d) (1) of the Military Selective Service Act (50 U.S.C.App. 456(d) (1)) shall serve in the armed forces for a total initial period of not less than six years nor more than eight years, as provided in regulations prescribed by the Secretary of Defense for the armed forces under his jurisdiction and by the Secretary of Homeland Security for the Coast Guard when it is not operating as service in the Navy, unless such person is sooner discharged under such regulations because of personal hardship. Any part of such service that is not active duty or that is active duty for training shall be performed in a reserve component.

(b) Each person covered by subsection (a) who is not a Reserve, and who is qualified, shall, upon his release from active duty, be transferred to a reserve component of his armed force to complete the service required by subsection (a).

10 U.S.C. § 1204

Upon a determination by the Secretary concerned that a member of the armed forces not covered by section 1201, 1202, or 1203 of this title is unfit to perform the duties of his office, grade, rank, or rating because of physical disability, the Secretary may retire the member with retired pay computed under section 1401 of this title, if the Secretary also determines that--

(1) based upon accepted medical principles, the

disability is of a permanent nature and stable;
(2) the disability--
(A) was incurred before September 24, 1996, as the proximate result of--
(i) performing active duty or inactive-duty training;
(ii) traveling directly to or from the place at which such duty is performed; or
(iii) an injury, illness, or disease incurred or aggravated while remaining overnight, immediately before the commencement of inactive-duty training, or while remaining overnight between successive periods of inactive-duty training, at or in the vicinity of the site of the inactive-duty training, if the site of the inactive-duty training is outside reasonable commuting distance of the member's residence;
(B) is a result of an injury, illness, or disease incurred or aggravated in line of duty after September 23, 1996--
(i) while performing active duty or inactive-duty training;
(ii) while traveling directly to or from the place at which such duty is performed; or
(iii) while remaining overnight, immediately before the commencement of inactive-duty training, or while remaining overnight between successive periods of inactive-duty training, at or in the vicinity of the site of the inactive-duty training; or
© is a result of an injury, illness, or disease incurred or aggravated in line of duty--
(i) while the member was serving on funeral honors duty under section 12503 of this title or section 115 of title 32;
(ii) while the member was traveling to or from the place at which the member was to so serve; or
(iii) while the member remained overnight at or in the vicinity of that place immediately before so serving, if

the place is outside reasonable commuting distance from the member's residence;
(3) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and
(4) either–
(A) the member has at least 20 years of service computed under section 1208 of this title; or
(B) the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination

10 U.S.C. § 1214
No member of the armed forces may be retired or separated for physical disability without a full and fair hearing if he demands it.

10 U.S.C. § 1222
(a) Response to applications and appeals.--The Secretary of each military department shall ensure, in the case of any member of the armed forces appearing before a physical evaluation board under that Secretary's supervision, that documents announcing a decision of the board in the case convey the findings and conclusions of the board in an orderly and itemized fashion with specific attention to each issue presented by the member in regard to that member's case. The requirement under the preceding sentence applies to a case both during initial consideration and upon subsequent consideration due to appeal by the member or other circumstance.

10 U.S.C. § 12301
(a) In time of war or of national emergency declared by

Congress, or when otherwise authorized by law, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, of a reserve component under the jurisdiction of that Secretary to active duty for the duration of the war or emergency and for six months thereafter. However a member on an inactive status list or in a retired status may not be ordered to active duty under this subsection unless the Secretary concerned, with the approval of the Secretary of Defense in the case of the Secretary of a military department, determines that there are not enough qualified Reserves in an active status or in the inactive National Guard in the required category who are readily available.

10 U.S.C. § 12302

(a) In time of national emergency declared by the President after January 1, 1953, or when otherwise authorized by law, an authority designated by the Secretary concerned may, without the consent of the persons concerned, order any unit, and any member not assigned to a unit organized to serve as a unit, in the Ready Reserve under the jurisdiction of that Secretary to active duty for not more than 24 consecutive months.

10 U.S.C. § 14002

(a) The Secretary of each military department shall maintain a single list, to be known as the reserve active-status list, for each armed force under the Secretary's jurisdiction. That list shall include the names of all reserve officers of that armed force who are in an active status other than those on an active-

duty list described in section 620 of this title or warrant officers (including commissioned warrant officers).

28 U.S.C. § 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

32 C.F.R. § 724.101

The Naval Service is comprised of the uniformed members of the United States Navy and the United States Marine Corps, including active and inactive reserve components.

32 C.F.R. § 724.107

In the context of the review function prescribed by 10 U.S.C. 1553, a discharge or dismissal is a complete separation from the Naval Service, other than one pursuant to the sentence of a general court-martial.

32 C.F.R. § 728.101

(a) Notice of eligibility (NOE). While the NOE is basically a document that substantiates entitlement to a disability benefit equal to pay and allowances, it may be accepted when required to substantiate eligibility for benefits other than pay and allowances, i.e., treatment in USMTFs under the provisions of title 10, United States Code.
(b) Physical disability benefits. The following, excerpted and paraphrased from SECNAVINST 1770.3, paragraph 10, is applicable when a reservist may be entitled to physical disability benefits.

(1) When a notice of eligibility (NOE) has been issued to a member hospitalized in a naval MTF and the

attending physician is of the opinion that recovery is not anticipated or that the reservist is not expected to be fit for return to full duty within a reasonable period, a medical board will be convened and the case managed the same as that of a Regular member. Assure that a copy of the NOE accompanies the medical board report forwarded to the Central Physical Evaluation Board. Disability benefits, equal to pay and allowances, will continue in such instances until final disposition.

(2) There is no limited duty status, per se, for inactive reservists. However, if the attending physician determines that a reservist is temporarily unfit for full duty, but will be fit for full duty following a period of convalescence or following duty with physical limitations, not to exceed 6 months, the physician may return the reservist to duty with a summary of the hospitalization or treatment. The summary will set forth the limitations posed by the member's disability and the period of such limitations. Followup hospitalization, treatment, and evaluation for the same condition may be provided at USMTFs during the period of restricted duty, if required. If, during the period of the restricted duty, it appears that the reservist will be permanently unfit for full duty, promptly authorize the reservist to report for evaluation, treatment if required, and appearance before a medical board at the nearest naval MTF capable of accomplishing same. Admission to the sicklist is authorized, when required. Should the medical board recommend appearance before a physical evaluation board, disability benefits equal to pay and allowances should continue until final disposition is effected.